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## Got Rights? Not if You're a Sex Offender in the Seventh Circuit

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## **GOT RIGHTS? NOT IF YOU'RE A SEX OFFENDER IN THE SEVENTH CIRCUIT**

SHEILA T. CAPLIS\*

Cite as: Sheila T. Caplis, *Got Rights? Not if You're a Sex Offender in the Seventh Circuit*, 2 SEVENTH CIRCUIT REV. 116 (2006), at <http://www.kentlaw.edu/7cr/v2-1/caplis.pdf>.

### INTRODUCTION

The convicted sex offender is perhaps the most despised and unsympathetic member of American society; and specifically those convicted of crimes against children are considered the vilest. The societal view of sex offenders is best exemplified by the words of Justice Kennedy in *McKune v. Lile*, where he succinctly stated: "Sex offenders are a serious threat in this Nation."<sup>1</sup> This view spans the continuum from the most respected jurist to the average person. It stems from the fact that these offenders harm children and other vulnerable persons.<sup>2</sup> It also stems from the belief that since sex offenders are released back into society, they are more likely than other criminals to re-offend.<sup>3</sup> This societal view also makes it easier

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<sup>1</sup> 536 U.S. 24, 32 (2002) (holding that sexual abuse treatment program for prison inmates did not amount compelled self-incrimination).

<sup>2</sup> See *id.*

<sup>3</sup> *Id.*; but see ERIC LOTKE, NAT'L CENTER ON INSTITUTIONS AND ALTERNATIVES, INC., SEX OFFENSES: FACTS, FICTIONS, AND POLICY IMPLICATIONS 2 (2006), available at <http://66.165.94.98/stories/SexOffendersReport.pdf> (noting that "[r]ecidivism rates are relatively low, typically running in the 3- 13% range, and among the lowest of all types of crimes").

for legislatures to justify regulations against sex offenders as communities look for ways to reduce the frequency and severity of sex crimes.<sup>4</sup>

In the name of public safety, localities require sex offenders to not only publicly classify themselves but also restrict where sex offenders may live and what public spaces sex offenders may enter and enjoy.<sup>5</sup> These restrictions against sex offenders pass without opposition, garner support from the community, and when challenged in court are uniformly upheld.<sup>6</sup> Not only do the courts dismiss any and all constitutional arguments, but they also allude to the fact that any restriction against sex offenders would pass rational basis review for the safety of children is always a legitimate interest.<sup>7</sup>

In September 2006, the United States Circuit Court for the Seventh Circuit entertained *Brown v. Michigan City*, which dealt with the “rights” of sex offenders and upheld a law directed at a sex offender.<sup>8</sup> The Seventh Circuit did not stray from the path set by previous courts and may even have gone a step further, upholding an ordinance which bans a specific individual from entering public parks.<sup>9</sup> In upholding this ordinance, the Seventh Circuit has aided the general trend to strip convicted sex offenders of their rights.

Part I focuses on the background of *Brown v. Michigan City* including the facts and reasoning behind the decision as well as the

<sup>4</sup> See LOTKE, *supra* note 3, at 1.

<sup>5</sup> See Richard R. Whidden Jr. and Tiffany A. Richards, *Local Government Regulation of Sex Offenders: Addressing a Threat*, (2006), <http://www.nationallawcenter.org/news/news/nlc-publishes-article-on-local-sex-offender-laws.html> (stating that fourteen states have enacted residence restrictions and three communities have enacted ordinance prohibiting sex offenders from visiting parks). See, e.g., *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005)

<sup>6</sup> Patrick Whitnell, *Legal Notes: Coping with the Paroled Sex Offender Next Door*, (2006), <http://www.cacities.org/index.jsp?zone=wcm&previewStory=24692#>

<sup>7</sup> See, e.g., *McKune*, 536 U.S. at 33. (stating in regards to Kansas’ Sexual Abuse Treatment Program, “[s]tates thus have a vital interest in rehabilitating convicted sex offenders”).

<sup>8</sup> 462 F.3d 720, 722 (7th Cir. 2006).

<sup>9</sup> *Id.*

history of regulations against sex offenders and their constitutionality as decided by both the Seventh Circuit and the Supreme Court. Part II analyzes the decision made by the Seventh Circuit in *Brown v. Michigan City*. It examines the Seventh Circuit's decision and finds that the deferential use of the rational basis standard of review is flawed. If rational basis review is used for each and every sex offender law, then any restriction placed on sex offenders will be deemed constitutional. This places sex offenders in a unique situation, although they are released back into society they do not have the same rights as any other citizen and any law which passes rational basis review can strip them of even more rights.

## I. BACKGROUND

### A. *Brown v. Michigan City: The Facts*

In 1995, Mr. Brown was convicted of one count of child molestation.<sup>10</sup> He was sentenced to six years in prison with three years suspended.<sup>11</sup> After his release, in 1999, Mr. Brown was placed on probation for the remaining three years and completed court-required counseling.<sup>12</sup> Between 1995 and 2002, Mr. Brown complied with sex offender laws to the best of his knowledge and had no arrests.<sup>13</sup> Each day during that time span Mr. Brown did, however, frequent Washington Park.<sup>14</sup>

Washington Park is a large public park located on Lake Michigan.<sup>15</sup> Residents may enter Washington Park with a resident pass.<sup>16</sup> Mr. Brown began visiting Washington Park on a daily basis

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<sup>10</sup> *Id.* at 723.

<sup>11</sup> *Id.* at 723 n.3.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 724.

<sup>14</sup> *Id.* at 722.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

with his wife in 1988.<sup>17</sup> When they visited the park, they would, according to Mr. Brown, “sit and watch the sunsets and sunrises, drink coffee, [and] smoke cigarettes.”<sup>18</sup> After his wife’s death, Mr. Brown continued this daily ritual.<sup>19</sup> Over the course of approximately fourteen years, Mr. Brown would drive to Washington Park, park by the lake, drink coffee, and smoke cigarettes.<sup>20</sup> For the most part, he did not leave his vehicle.<sup>21</sup>

In 2002, the Michigan City Department of Parks became aware of Mr. Brown, when he had been observed at Stone Lake Beach in LaPorte, Indiana, watching beach patrons with binoculars.<sup>22</sup> An investigation by the LaPorte police discovered that Mr. Brown was a convicted sex offender.<sup>23</sup> Subsequently, the LaPorte Recreation Director informed the Michigan City Police Department of Mr. Brown.<sup>24</sup> The City admits that, while Mr. Brown’s daily activities were innocent, combined with his conviction of child molestation, his activities raised a “red flag.”<sup>25</sup> With this knowledge, police approached Mr. Brown in Washington Park on four separate occasions.<sup>26</sup> On the fourth occasion, a city attorney informed Mr. Brown that he was no longer allowed in the park.<sup>27</sup> Mr. Brown complied with this order and never re-entered Washington Park.<sup>28</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (quoting Brown’s deposition testimony).

<sup>19</sup> *Id.* at 722.

<sup>20</sup> *Id.* Mr. Brown would also “watch people at the beach, sometimes with binoculars.” *Id.* at 722 n.1. While Mr. Brown claims he only watched women on the beach, the city council alleges that he watched children and that the “women” he was watching were actually teenage girls. *Id.*

<sup>21</sup> *Id.* at 722

<sup>22</sup> *Id.* at 723.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (quoting Recreation Director Garbacik’s deposition testimony).

<sup>26</sup> *Id.* at 723- 24.

<sup>27</sup> *Id.* at 724.

<sup>28</sup> *Id.*

On July 31, 2002, the Michigan City Parks and Recreation Board informed Mr. Brown of a meeting at the Park Office, located in Washington Park, at which the Board would discuss the banning of Mr. Brown from Michigan City Park properties.<sup>29</sup> Mr. Brown did not attend the meeting.<sup>30</sup> On August 1, 2002, the Michigan City Parks and Recreation Board convened, and a Park Department attorney presented Resolution 548, entitled “A Resolution Prohibiting the Use of Park Department Properties by an Individual Having a Child Molesting History.”<sup>31</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* Mr. Brown testified in his deposition that he understood that he was invited to attend the meeting at the Park Office inside Washington Park but that he had been told by police never to re-enter the park. *Id.* A friend of Mr. Brown spoke with the Park Superintendent to determine if Mr. Brown could attend the meeting. *Id.* He received oral confirmation that Mr. Brown could attend without being arrested, but the superintendent and the city attorney refused to put this assurance in writing. *Id.*

<sup>31</sup> *Id.* at 724-25. The resolution provided:

WHEREAS, it was brought to the attention of this Board by the Department staff and the Michigan City Police Department that during the period of a recent summer day camp program for children conducted at Washington Park, an individual, namely, Robert E. Brown . . . , who was recognized by members of the Michigan City Police force as a convicted child molester, was observed by the Police and the Department staff frequenting Washington Park in [a] recreational/camping vehicle, while having a set of binoculars and a camera in his possession, and WHEREAS, this Board has determined that in order to discharge its responsibilities of child protection and safety, it is necessary to designate all properties and programs under the jurisdiction of the Department to be OFF LIMITS to any person who has been convicted of child molesting under Indiana Code, IC 35-42-4-3, or convicted of any other sex crime in which the victim is a child under the age of 18 years, and to ban such person from all Michigan City Parks and Recreation Department properties indefinitely.

NOW THEREFORE, BE IT RESOLVED BY THE MICHIGAN CITY PARKS AND RECREATION BOARD AS FOLLOWS:  
(1) That ROBERT E. BROWN . . . is hereby BANNED from all properties or programs operated under the jurisdiction of the

In presenting Resolution 548, the Park Department attorney explained that Mr. Brown had been involved in a “series of incidents . . . involving the safety and protection of children,” had been convicted of child molestation, and had been engaged in suspicious activity at Washington Park.<sup>32</sup> Mr. Brown’s activities included visiting the park everyday, on one occasion watching people with binoculars and a camera, and on numerous occasions driving slowly by a children’s day camp located in the Park.<sup>33</sup> The attorney stressed that the Board was responsible for the “care, custody, and safety of [children who visit the park].”<sup>34</sup> The Board unanimously passed the Resolution.<sup>35</sup>

After Mr. Brown commenced litigation, in August 2002, the Board reconvened for a special session without notifying Mr. Brown.<sup>36</sup> At the session the Board rescinded Resolution 548 and passed in its stead Resolution 552, entitled “A Resolution Prohibiting the Use of Park Department Properties by an Individual Having a Child Molesting History, Whose Observed Behavior Constitutes a Threat to the Safety of Children.”<sup>37</sup> Resolution 552 is substantially similar to its predecessor except that rather than making the park properties “OFF

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Michigan City Department of Parks and Recreation and that in the event said individual is found upon any such property, he shall be considered a trespasser, and shall be removed forthwith, or be subject to arrest for failure to depart the premises. (2) That all properties and programs operated under the jurisdiction of this Department are hereby declared OFF LIMITS to any person who has been convicted of child molesting under Indiana Code, IC 35-42-4-3, or convicted of any other sex crime in which the victim is a child under the age of 18 years, and in the event that such individual is identified and found upon any such property, he shall be considered a trespasser and shall be ordered to remove himself forthwith, or be subject to arrest for failure to depart the premises.

<sup>32</sup> *Id.* at 725.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

LIMITS to any person who has been convicted of child molesting under Indiana Code, IC 35-42-4-3, or convicted of any other sex crime in which the victim is a child under the age of 18 years,” Resolution 552 makes the Michigan City Parks “OFF LIMITS to the said Mr. Robert E. Brown who has been convicted of child molesting under Indiana Code, IC 35-42-4-3, and whose observed behavior in Washington Park is deemed by this Board to constitute a threat to the safety of children.”<sup>38</sup>

The Park attorney explained at the meeting that the proposed change was necessary to prevent Mr. Brown from a successful motion for class certification.<sup>39</sup> The attorney stated: “Resolution No. 548 must be ‘narrowly tailored’ and it is ‘narrowly tailored’ if it targets and eliminates no more tha[n] the exact source of evil it seeks to remedy.”<sup>40</sup> The Park Board unanimously voted to rescind Resolution 548 and to adopt Resolution 552.<sup>41</sup>

### *B. Brown v. Michigan: The Decision*

Mr. Brown attacked Resolution 552 on three separate constitutional grounds.<sup>42</sup> He claimed that this ordinance violates his substantive property interest in the Michigan City Parks and his substantive liberty interest based upon damage to his reputation, and that the application of this resolution violated his procedural due process rights.<sup>43</sup>

The United States District Court for the Northern District of Indiana dismissed each of these claims and granted summary judgment in favor of Michigan City.<sup>44</sup> It held that Mr. Brown had neither a

<sup>38</sup> *Id.* at 725-26 (emphasis added).

<sup>39</sup> *Id.* at 726.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Brown v. Michigan City, No. 3:02 CV 572 RM, 2005 WL 2281502, at \*12 (N.D. Ind. 2005).



protected property interest to enter a public park nor a protected liberty interest in his reputation to demand due process protections.<sup>45</sup> It also stated that although the right of access to a public park may be important, it is not fundamental.<sup>46</sup> The district court further found that the ban was rationally related to the compelling interest of protecting children, noting that Michigan City was not “bound to wait until Mr. [Brown] again committed child molestation or attempted child molestation in order to act.”<sup>47</sup> Finally, the district court inquired as to whether this ban was an arbitrary exercise of power.<sup>48</sup> It reasoned that the ban was not an arbitrary exercise of power as the ban did not “shock the contemporary conscience.”<sup>49</sup>

The Seventh Circuit<sup>50</sup> affirmed the district court’s opinion and held that the Michigan City Park Ordinance violated neither substantive due process nor procedural due process.<sup>51</sup> The court reasoned that Mr. Brown is not entitled to a constitutional property interest in the public parks, that Mr. Brown failed to demonstrate he was deprived of a valid liberty interest, and that, because no valid property or liberty interest was involved, it was not necessary to analyze what process was due to Mr. Brown.<sup>52</sup>

### 1. Substantive Due Process

The Seventh Circuit held that, according to the United States Supreme Court in *Washington v. Glucksberg*,<sup>53</sup> there is only a narrow category of fundamental rights—“the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital

<sup>45</sup> *Id.* at \*5-7.

<sup>46</sup> *Id.* at \*11.

<sup>47</sup> *Id.* at \*12 (quoting *Doe v. City of Lafayette*, 377 F.3d at 767 n.8).

<sup>48</sup> *Brown*, 2005 WL 2281502, at \*12.

<sup>49</sup> *Id.* (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 848 n.8 (1998)).

<sup>50</sup> The panel consisted of Judges Ripple, Manion, and Kanne.

<sup>51</sup> *Brown v. Michigan City*, 462 F.3d 720, 734 (7th Cir. 2006).

<sup>52</sup> *Id.* at 729-32.

<sup>53</sup> 521 U.S. 702 (1997).

privacy, to use contraception, to bodily integrity, and to abortion.”<sup>54</sup> The court found that the right to enter a public park is not contained in this narrow list and that the list should not be expanded to include it.<sup>55</sup> Further, the court found that the ban of Mr. Brown was rationally related to the goal of protecting the children of the community and thus passes rational basis review.<sup>56</sup>

## 2. Procedural Due Process

To determine whether Resolution 522 violated procedural due process the Seventh Circuit first analyzed whether Mr. Brown was deprived of a protected interest and whether process was due.<sup>57</sup> The court relied on the framework propounded by the Supreme Court in *Mathews v. Eldridge*<sup>58</sup> focusing on factors such as the private interest affected by the official action, the risk of an erroneous deprivation of such an interest, and the probable value of procedural safeguards.<sup>59</sup>

The court reasoned that for there to be a property interest an individual must have a legitimate claim of entitlement.<sup>60</sup> The court found that the distribution of park passes to residents did not create a legitimate interest in visiting the park.<sup>61</sup> Accordingly, the Constitution does not guarantee access to Washington Park.<sup>62</sup> Further, the court reasoned that for Michigan City to have implicated a liberty interest, the ordinance needed to not only defame Mr. Brown but also to alter his legal status, such as depriving him of a right.<sup>63</sup> The court found

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<sup>54</sup> *Brown*, 462 F.3d at 732 (quoting *Glucksberg*, 521 U.S. at 720) (noting that there may also be a right to refuse unwanted lifesaving medical treatment).

<sup>55</sup> *Brown*, 462 F.3d at 732.

<sup>56</sup> *Id.* at 734.

<sup>57</sup> *Id.* at 728.

<sup>58</sup> 424 U.S. 319 (1976).

<sup>59</sup> *Brown*, 462 F.3d at 728.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 729.

<sup>63</sup> *Id.* at 730 (citing *Paul v. Davis*, 424 U.S. 693 (1976)).

that Mr. Brown's claims did not satisfy these requirements, because he could not establish that he had a right to enter the public park.<sup>64</sup>

For Mr. Brown's procedural due process claims, the court held that Mr. Brown was neither deprived of a property interest or a liberty interest, and accordingly did not need to determine whether Mr. Brown received adequate process.<sup>65</sup>

### *C. Regulating Sex Offenders*

The term "sex offender" has two broad definitions. A sex offender can be:

[A]ny person who willfully and lewdly commits any lewd or lascivious act, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing, or gratifying the lust, passions, or sexual desires of that person or the child.<sup>66</sup>

Or, a sex offender can be defined as "any person who commits an act by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person."<sup>67</sup>

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<sup>64</sup> *Brown*, 462 F.3d at 731.

<sup>65</sup> *Id.*

<sup>66</sup> MARCUS NIETO & DAVID JUNG, CAL. STATE LIBRARY, THE IMPACT OF RESIDENCY RESTRICTIONS ON SEX OFFENDERS AND CORRECTIONAL MANAGEMENT PRACTICES: A LITERATURE REVIEW 1 (2006), available at <http://www.library.ca.gov/crb/06/08/06-008.pdf> (quoting CAL. PENAL CODE § 288(a) (West 2005)). In Indiana, a sex offender is an individual who has been convicted of any of the following offenses or has attempted to commit any of the following offenses: rape, criminal deviate conduct, child molesting, child exploitation, vicarious sexual gratification, child solicitation, child seduction, sexual misconduct with a minor, incest, sexual battery, kidnapping if the victim is less than 18, criminal confinement if the victim is less than 18, and possession of child pornography. IC 11-8-8-5.

<sup>67</sup> NIETO & JUNG, *supra* note 66, at 1 (quoting CAL. PENAL CODE § 288(b)(1)).

In a given year, there are 60,000 to 70,000 arrests for child sexual assault and 15,000 to 20,000 arrests for rape.<sup>68</sup> Child molesters are likely to recidivate at a rate of 12.7%, whereas rapists have a recidivism rate of 18.9%.<sup>69</sup> Currently, there are an estimated 550,000 registered sex offenders in this country.<sup>70</sup> Because of this large number and the belief that sexual offenders are more likely to be repeat offenders, legislatures use a variety of policies to protect the public against sex offenders.<sup>71</sup> Specifically, sex offender legislation is intended to prevent the occurrence of sex offenses.<sup>72</sup>

In 1994, Congress enacted the Jacob Wetterling Act which requires sex offender registration.<sup>73</sup> Two years later, Congress enacted

<sup>68</sup> NIETO & JUNG, *supra* note 66, at 1 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIME CHARACTERISTICS: VICTIM/OFFENDER RELATIONSHIP (2004)).

<sup>69</sup> NIETO & JUNG, *supra* note 66, at 2.

<sup>70</sup> *Id.*

<sup>71</sup> See LOTKE, *supra* note 3, at 2; *but see id.* at 2-3 (citing to Solicitor General of Canada Karl Hanson's 2004 study finding that the overall recidivism rate for new sex crimes is 13.7%, the recidivism rate for child molestation is 12.7%, the recidivism rate for child molestation within families is 8.4%, and the recidivism rate for rape is 18.9%); *see also id.* at 2 (quoting DEPARTMENT OF REHABILITATION AND CORRECTION, STATE OF OHIO, TEN YEAR RECIDIVISM FOLLOW-UP OF 1989 SEX OFFENDER RELEASES 12 (2001)):

Certainly any instance of sexual recidivism is cause for concern, and we should not lose sight that even a 1% sexual recidivism rate represents a certain number of victims of sexual assault. However, there is a rather widespread misconception that sex offenders, as a whole, are repeat offenders. While this study is obviously unable to determine the actual rate of reoffense, it is clear that a sex offender returning to an Ohio prison for a new offense is a fairly unusual occurrence.

Compared to other recidivism rates—79% for stealing motor vehicles and 77% for possession of stolen property—sexual recidivism is extremely low. See LOTKE, *supra* note 3, at 3; *see also* NIETO & JUNG, *supra* note 66, at 2 (noting that on average the “recidivism rates for all types of sex offenders are lower than for other offenders”).

<sup>72</sup> See LOTKE, *supra* note 3, at 1.

<sup>73</sup> Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (2006).

Megan's Law requiring states to make sex offender registries available to the public.<sup>74</sup> Following the lead of Congress, states began passing similar legislation.<sup>75</sup> All fifty of the states have registration requirements and make the registries available to the public.<sup>76</sup> Seventeen states have civil commitment statutes for "sexually violent predators."<sup>77</sup> These statutes require that a sex offender who has been adjudicated a "sexually violent predator" be committed to a medical facility after completion of his criminal sentence.<sup>78</sup>

Further, local legislatures have begun passing distance marker legislation and child safety zone legislation.<sup>79</sup> Distance marker legislation provides that sex offenders cannot reside within a certain distance of schools, daycare centers, or any other places where children gather.<sup>80</sup> Child safety zone legislation provides that a sex offender may not loiter within certain feet of areas where children may congregate.<sup>81</sup> The Michigan City Parks and Recreation Board's ordinance banning Mr. Brown from all Michigan City parks is the logical extension of the general trend in sex offender legislation.<sup>82</sup> It

<sup>74</sup> 42 U.S.C. § 14071(e); *see also* NIETO & JUNG, *supra* note 66, at 2.

<sup>75</sup> *See, e.g.,* Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003); Smith v. Doe, 538 U.S. 84 (2003).

<sup>76</sup> NIETO & JUNG, *supra* note 66, at 8-9.

<sup>77</sup> *Id.* at 3.

<sup>78</sup> *Id.*

<sup>79</sup> *See id.*; *see also* Whitnell *supra* note 5 (noting that some localities have also begun creating Zoning Dispersal legislation which limit the number of sex offenders who may live in the same residential dwelling).

<sup>80</sup> *See* NIETO & JUNG, *supra* note 66, at 3 (noting that 22 states have enacted some form of distance marker legislation, ranging from 500 feet to 2,500 feet). In Illinois a child sex offender cannot reside within 500 feet of a school or school property. 720 ILL. COMP. STAT. § 5/11-9.3(b-5) (2006). In Indiana, a violent sex offender cannot reside within 1,000 feet of any school property for the duration of parole. IND. CODE § 11-13-3-4(g)(2)(B)(2006). Wisconsin does not have a sex offender residency restriction law.

<sup>81</sup> *See* NIETO & JUNG, *supra* note 66, at 15 (Typical distance is 300 ft. No reported court decisions affecting Child Safety Zone legislation, but two courts have upheld ban from city parks).

<sup>82</sup> *See* Brown v. Michigan City, 462 F.3d 720 (7th Cir 2006).

demonstrates how sex offender legislation has narrowed from the general to the specific and how sex offender legislation has the ability to strip sex offenders of their rights.<sup>83</sup>

#### *D. Constitutional Challenges*

Before the United States Supreme Court, the laws directed against sex offenders have experienced constitutional challenges from various fronts.<sup>84</sup> Sex offender laws have been attacked on various bases including violating the First Amendment, the *ex post facto* clause, and double jeopardy.<sup>85</sup> Under each challenge, state and federal courts have upheld legislation directed at sex offenders.<sup>86</sup>

Regardless of whether there has been a violation or not, the Court has held that the laws directed against sex offenders pass rational basis review; the laws are deemed rational means to the legitimate goal of protecting children.<sup>87</sup> The Court, finding that no violation has occurred under any of these theories, applies the less stringent rational basis review.<sup>88</sup> Under this standard, each of these laws passes muster.<sup>89</sup> For example, “residency restrictions do not offend the equal protection clause. They represent a rational legislative determination that excluding sex offenders from areas where children congregate will advance the state’s interest in protecting children.”<sup>90</sup>

<sup>83</sup> *Id.*

<sup>84</sup> See NIETO & JUNG, *supra* note 66, at 43.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See, e.g., *Smith v. Doe*, 538 U.S. 84, 102-03 (2003); *McKune v. Lile*, 536 U.S. 24, 48 (2002).

<sup>88</sup> See, e.g., *Smith*, 538 U.S. at 102-03; *McKune*, 536 U.S. at 48.

<sup>89</sup> See, e.g., *Smith*, 538 U.S. at 102-03; *McKune*, 536 U.S. at 48.

<sup>90</sup> NIETO & JUNG, *supra* note 66, at 44.

## 1. The Supreme Court

In *Kansas v. Hendricks*, the Supreme Court upheld the civil commitment of a sexually violent predator under the Kansas Sexually Violent Predator Act.<sup>91</sup> The Act which intended to prevent recidivism, established a procedure to civilly commit for long term care a sex offender who is deemed to be a “sexually violent predator.”<sup>92</sup> Specifically, in *Kansas*, Hendricks sought to prevent the state from committing him as sexually violent predator after he had served his prison sentence.<sup>93</sup> The Court found that the act did not violate the constitutional prohibition against double jeopardy, the ban on *ex post facto* lawmaking, or due process.<sup>94</sup> In addressing the substantive due process argument, the Court noted that although freedom from physical restraint is a core liberty interest, an “involuntary civil confinement of a limited subclass of dangerous persons” is not contrary to the understanding of ordered liberty.<sup>95</sup> Further, because the Act entails civil commitment proceedings, it is non-punitive and therefore does not violate double jeopardy or the *ex post facto* clause.<sup>96</sup> In 2000, the Supreme Court revisited the alleged punitive nature of civil commitment legislation.<sup>97</sup> It found Washington’s Community Protection Act<sup>98</sup> constitutional as the statute was civil rather than criminal.<sup>99</sup> The Court, expanding its holding in *Kansas v. Hendricks*, held that a civil commitment of a sexually violent predator is constitutional both facially and as applied.<sup>100</sup>

<sup>91</sup> 521 U.S. 346, 350-53 (1997); Kan. Stat. Ann. § 59-29a01 et seq. (1994).

<sup>92</sup> Kan. Stat. Ann. § 59-29a01 et seq. (1994).

<sup>93</sup> *Kansas*, 521 U.S. at 354.

<sup>94</sup> *Id.* at 371.

<sup>95</sup> *Id.* at 357.

<sup>96</sup> *Id.* at 369.

<sup>97</sup> *See Seling v. Young*, 531 U.S. 250 (2001).

<sup>98</sup> Wash. Rev. Code § 71.09.010 et seq. (1992).

<sup>99</sup> *Seling*, 531 U.S. at 260-61.

<sup>100</sup> *Id.* at 267.

In 2003, the Supreme Court upheld the Alaska Sex Offender Registration Act.<sup>101</sup> The Act which requires registration and community notification was criticized as constituting retroactive punishment.<sup>102</sup> The Court reasoned that the Alaska law is not punitive, and thus does not violate the *ex post facto* clause.<sup>103</sup> However, a dissenting Justice Stevens noted that proper analysis would have included asking whether the registration statute affects a protected liberty interest.<sup>104</sup>

Similarly, in *Connecticut Department of Public Safety v. Doe*, the Court upheld Connecticut's Megan's Law on procedural due process grounds.<sup>105</sup> It held that states are permitted to classify all sex offenders as a group and require registration and notification.<sup>106</sup> Here, the Court did not address substantive due process, but Justice Scalia's concurrence suggests that there is the possibility that such a claim may be successful.<sup>107</sup> Justice Scalia noted: "Absent a claim . . . that the liberty interest in question is so fundamental as to implicate so-called 'substantive' due process, a properly enacted law can eliminate it."<sup>108</sup> Accordingly, as there was no claim that this violated substantive due process, the law was held constitutional.<sup>109</sup>

These cases dealing with sex offender legislation decided by the Supreme Court demonstrate the Court's trend to uphold sex offender legislation against attacks on various constitutional fronts.<sup>110</sup> These

<sup>101</sup> *Smith v. Doe*, 538 U.S. 84, 85 (2003); Alaska Stat. §§ 12.63.010(a), (b) (2000).

<sup>102</sup> *Smith*, 538 U.S. at 92.

<sup>103</sup> *Id.* at 105-06.

<sup>104</sup> *Id.* at 111-12 (Stevens, J., dissenting) (finding both that a protected liberty interest as involved and that registration and notification requirements are punitive).

<sup>105</sup> *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003). Conn. Gen. Stat. §§ 54-251, 54-252, 54-254 (2001).

<sup>106</sup> *Conn.*, 538 U.S. at 8.

<sup>107</sup> *See id.* (Scalia, J., concurring).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *See Smith v. Doe*, 538 U.S. 84 (2003); *Conn.*, 538 U.S. 1; *Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Hendricks*, 521 U.S. 346 (1997).



cases also demonstrate that substantive due process may be the only successful claim available.<sup>111</sup>

## 2. The Seventh Circuit

The Seventh Circuit has also established a line of precedent upholding claims against sex offender laws.<sup>112</sup> Further, the Seventh Circuit has specifically addressed the issue of a regulation specifically banning a sex offender from a public park.<sup>113</sup>

In 2003, in *Doe v. Lafayette*, a Seventh Circuit panel held that banning sex offenders from a public park violates the First Amendment because it punishes a person for his thoughts.<sup>114</sup> In comparing the sex offender to other criminals, the court noted:

[W]e would not sanction criminal punishment of an individual with a criminal history of bank robbery (a crime, like child molestation, with a high rate of recidivism . . .) simply because she or he stood in the parking lot of a bank and thought about robbing it. . . . [Further,] punishment of a drug addict who stands outside a dealer's house craving a hit but successfully resists the urge to enter and purchase drugs would be offensive to our understanding of the bounds of the criminal law.<sup>115</sup>

<sup>111</sup> See *Conn.*, 538 U.S. at 8.

<sup>112</sup> See, e.g., *Doe v. City of Lafayette (Lafayette II)*, 377 F.3d 757, 774 (7th Cir. 2004) (rejecting petitioner's challenges based on the First and Fourteenth Amendments.).

<sup>113</sup> *Doe v. City of Lafayette (Lafayette I)*, 334 F.3d 606 (7th Cir. 2003), *rev'd on reh'g en banc, Lafayette II*, 377 F.3d 757.

<sup>114</sup> 334 F.3d at 613.

<sup>115</sup> *Id.* at 612.

However, in 2004, on rehearing *en banc*, the Seventh Circuit reversed the panel's decision by holding that the park ban does not violate either the First Amendment or Due Process.<sup>116</sup>

In *Doe v. Lafayette*, Doe, a convicted sex offender, was banned from all public parks in Lafayette, Indiana.<sup>117</sup> Doe had a long history of arrests and crimes for sexual offenses directed towards children.<sup>118</sup> The act that precipitated the ban was Doe's "cruising" the parks and watching children, actions that were brought to the attention of the Lafayette Police Department.<sup>119</sup> Doe admits that he went to a public park, and upon seeing some children, felt that he should leave before he did anything.<sup>120</sup> In his own words, Doe stated regarding the occurrence:

When I saw the three, the four kids there, my thoughts were thoughts I had before when I see children, possibly expose myself to them, I thought of the possibility of, you know, having some kind of sexual contact with the kids, but I know with four kids there, that's pretty difficult to do. It's a wide open area. Those thoughts were there, but they, you know, weren't realistic at the time. They were just thoughts.<sup>121</sup>

Subsequently, the superintendent of the Lafayette Parks and Recreation Department sent a letter to Doe informing him that he was prohibited from entering any of the City's parks.<sup>122</sup>

The Seventh Circuit, sitting *en banc*, held that Doe was not being punished for his impure thoughts in violation of the First

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<sup>116</sup> *Lafayette II*, 377 F.3d at 758.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 759.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 760 (quoting Doe's deposition testimony).

<sup>122</sup> *Id.*

Amendment.<sup>123</sup> The court reasoned that the City did not ban Doe from the parks for having these thoughts; rather, the City banned him because these were not mere thoughts because he was on the brink of acting on these thoughts.<sup>124</sup> The court also held that Doe was not being deprived a fundamental right, because his right to enter the parks is not “fundamental.”<sup>125</sup> The court relied on the same reasoning it applied in *Brown v. Michigan*.<sup>126</sup> The court emphasized the narrowness of fundamental rights and presented an exhaustive list of those rights which have been deemed fundamental.<sup>127</sup> The Seventh Circuit continued stating:

By banning Mr. Doe from the parks, the City only has deprived him of the “right” to go to the City’s parks which he wishes to use for allegedly innocent, recreational purposes. That this right is not “fundamental” to Mr. Doe’s personhood is readily apparent not only from a comparison to other “fundamental” rights, but also from the fact that Mr. Doe has not even entered the City’s parks since at least 1990.<sup>128</sup>

Finding that the City had violated neither the First nor Fourteenth Amendments, the court applied the rational basis standard to review the City’s ban.<sup>129</sup> The banning of a sex offender from entering a public park is rationally related to the interest in protecting children.<sup>130</sup> Further, the court alluded that this ban would also pass the higher standard of strict scrutiny because the interest in protecting children is

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<sup>123</sup> *Id.* at 766.

<sup>124</sup> *Id.* at 767.

<sup>125</sup> *Id.* at 770.

<sup>126</sup> *See Brown v. Michigan City*, 462 F.3d 720, 732 (7th Cir. 2006).

<sup>127</sup> *Lafayette II*, 377 F.3d at 770-71.

<sup>128</sup> *Id.* at 771.

<sup>129</sup> *Id.* at 773.

<sup>130</sup> *See id.*

compelling, and the ban of one sex offender based on his near relapse is narrowly tailored.<sup>131</sup>

More recently, the Seventh Circuit in *Harris v. Donahue* remanded a prison inmate case where the Department of Prisons banned minor children from visiting sex offender parents.<sup>132</sup> The court recognized that there is a cause of action as to whether this ban violates a due process liberty interest to associate with your own kids but offered no opinion as to whether it would be successful.<sup>133</sup>

The Seventh Circuit has been less consistent than the Supreme Court in regards to legislation directed against sex offenders; in some decisions it has demonstrated their unconstitutionality and in others it has emphasized the possibility for successful claims.<sup>134</sup> However, as with the Supreme Court, precedent still holds that these laws will be held constitutional under the rational basis standard of review.<sup>135</sup>

## II. ANALYSIS OF *BROWN V. MICHIGAN CITY*

Although precedent demonstrates that claims against sex offender legislation have been almost universally unsuccessful, it is less clear whether a court would view such regulations as a deprivation of rights.<sup>136</sup> Precedent has left the door open to whether there can be a successful substantive due process challenge.<sup>137</sup> In *Brown*, the Seventh Circuit closes this door.<sup>138</sup> Technically, the Seventh Circuit remains true to both its own precedent as well as the general trend of Supreme

<sup>131</sup> *Id.* at 773-74.

<sup>132</sup> *Harris v. Donahue*, 175 Fed. Appx. 746, 748 (7th Cir. 2006).

<sup>133</sup> *Id.*

<sup>134</sup> See *id.*; *Doe v. City of Lafayette (Lafayette I)*, 334 F.3d 606 (7th Cir. 2003), *rev'd on reh'g en banc, Lafayette II*, 377 F.3d 757.

<sup>135</sup> See *Lafayette II*, 377 F.3d 757.

<sup>136</sup> See, e.g., *id.* at 770-71; *Seling v. Young*, 531 U.S. 250 (2001).

<sup>137</sup> See *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003).

<sup>138</sup> *Brown v. Michigan City*, 462 F.3d 720, 732 (7th Cir. 2006).

Court precedent.<sup>139</sup> However, it fails to look at other factors and seems to be focused on obtaining the “popular” outcome.

*A. Brown v. Michigan City: Sex offenders do not have a property interest in visiting and enjoying a public park.*

In *Brown v. Michigan*, the court rejected the argument that Mr. Brown had a fundamental right to enter and enjoy the parks in Michigan City, Indiana.<sup>140</sup> The court reasoned that an individual must have a legitimate claim of entitlement in order to claim a property interest and that Mr. Brown did not have a legitimate expectation of enjoying a city park, even though admission to the park is free to Michigan City residents and even though Mr. Brown had a history and practice of entering and enjoying Washington Park.<sup>141</sup>

It is widely accepted that a fundamental right is a right which is deeply rooted in this “[n]ation’s history, legal traditions, and practices.”<sup>142</sup> To state that the openness of public parks is not deeply rooted in our history, legal traditions, and practices is a difficult proposition to make.<sup>143</sup> Since this nation’s inception, tracts of land have been held in trust for public use and public enjoyment.<sup>144</sup> Legal analysis and tradition rely upon the openness of parks:<sup>145</sup>

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such

<sup>139</sup> See *Smith v. Doe*, 538 U.S. 84 (2003); *Conn.*, 538 U.S. 1; *Seling*, 531 U.S. 250; *Kansas v. Hendricks*, 521 U.S. 346 (1997).

<sup>140</sup> *Brown*, 462 F.3d at 732-33.

<sup>141</sup> *Id.* at 732.

<sup>142</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

<sup>143</sup> See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

<sup>144</sup> See 64 C.J.S. *Municipal Corporations* § 1557 (2006).

<sup>145</sup> See *Hague*, 307 U.S. at 515-16.

use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Specifically, First Amendment forum analysis relies on the concept that parks are open, making “streets and parks” the paradigmatic location for free expression.<sup>146</sup> And in practice parks are held open to the public; the general public cannot be excluded from a park for an unreasonable duration<sup>147</sup> and a particular class of persons cannot arbitrarily be excluded from entering and enjoying a public park.<sup>148</sup>

Further, in *City of Chicago v. Morales*, a plurality of the Court stated that there is a fundamental right to loiter in a public place.<sup>149</sup> In determining the constitutionality of the city of Chicago’s gang loitering ordinance, it noted that “an individual’s decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is ‘a part of our heritage.’”<sup>150</sup> The plurality thus stated that “the freedom to loiter for innocent purposes is part of the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.”<sup>151</sup> The Supreme Court has also held that there is a fundamental interest in interstate travel, but it is

<sup>146</sup> See *Kunz v. New York*, 340 U.S. 290, 293-94 (1951); *United States v. Grace*, 461 U.S. 171, 180 (1983). In the public forum, speech may be regulated, but it may be abridged or denied. *Hague*, 307 U.S. at 516.

<sup>147</sup> 64 C.J.S. *Municipal Corporations* § 1557 (2006) (citing *Nebraska City v. Nebraska City Speed & Fair Ass’n*, 186 N.W. 374 (Neb. 1922); *Sherburne v. City of Portsmouth*, 58 A. 38 (N.H. 1904)).

<sup>148</sup> 64 C.J.S. *Municipal Corporations* § 1557 (2006) (citing *Blackman Health Resort v. City of Atlanta*, 151 S.E. 525 (Ga. 1921)).

<sup>149</sup> *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999); *but see id.* at 83 (Scalia, J., dissenting); *id.* at 98 (stating that there is no constitutional right to loiter).

<sup>150</sup> *City of Chicago*, 527 U.S. at 54 (quoting *Kent v. Dulles*, 357 U.S. 116, 126 (1958)).

<sup>151</sup> *City of Chicago*, 527 U.S. at 53.

unclear whether there is a comparable interest in intrastate travel and whether entering a public park would constitute intrastate travel.<sup>152</sup>

The Seventh Circuit's narrow construction of what is a fundamental right fails to analyze all the relevant factors; it fails to examine the history and openness of parks, the importance of parks in legal doctrine, and the general freedoms to travel and loiter.<sup>153</sup> The right to enter a park does not fit into any of the pigeon-holed rights that the Supreme Court has deemed fundamental.<sup>154</sup> However, like these rights, there is a history, tradition, and practice of opening parks to the public.<sup>155</sup> Further the right to loiter and the right to travel support that argument that there may be a right, or at least an interest in access to public parks.<sup>156</sup>

Additionally, in *Doe v. Lafayette*, the Seventh Circuit analyzed whether the right to enter the parks was fundamental to the individual.<sup>157</sup> It determined that because Doe had not entered the parks in over twelve years, his personhood was not implicated.<sup>158</sup> This is factually distinct from the situation in *Brown*.<sup>159</sup> Mr. Brown had been entering and enjoying the parks for over fifteen years.<sup>160</sup> Not only did he go to Washington Park as part of his daily schedule, but he enjoyed

<sup>152</sup> See *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 254-56 (1974) (reasoning that there is a right to intrastate travel); *but see* *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 276-77 (1993) (commenting that there is not a fundamental right to intrastate travel).

<sup>153</sup> See *Brown v. Michigan City*, 462 F.3d 720, 732-33 (7th Cir. 2006)

<sup>154</sup> See *id.* at 732.

<sup>155</sup> See 64 C.J.S. *Municipal Corporations* § 1557 (2006); *see also* *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939).

<sup>156</sup> See *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 254-56 (1974).

<sup>157</sup> *Doe v. Lafayette* ("Lafayette II"), 377 F.3d 757, 771 (7th Cir. 2004) (reasoning that the right to enter a park "is not 'fundamental' to Mr. Doe's personhood . . . from the fact that Mr. Doe has not even entered the City's parks since at least 1990")

<sup>158</sup> *Id.*

<sup>159</sup> See *Brown v. Michigan City*, 462 F.3d 720, 722 (7th Cir. 2006).

<sup>160</sup> *Id.*

the park for other purposes such as fishing, boating, and picnicking.<sup>161</sup> Unlike Doe, Mr. Brown's personhood was implicated by the ban.<sup>162</sup>

These cases and the facts present in *Brown v. Michigan City* demonstrate that an argument can be made that a fundamental interest or right has been implicated.<sup>163</sup> However, the Seventh Circuit brushes aside this case law and these factual distinctions and decides the case as if the ban against Mr. Brown was no different than any other restriction against a sex offender.<sup>164</sup>

*B. Brown v. Michigan City: Sex offenders do not have a liberty interest in protecting their reputation.*

The Seventh Circuit also rejected Mr. Brown's claim that Michigan City infringed upon his liberty interest in his reputation by classifying him as a "present threat" to children in the ordinance.<sup>165</sup> In doing so, the court relied on the test created in *Paul v. Davis*.<sup>166</sup> There, the Supreme Court held that mere injury to reputation alone does not deprive an individual of a liberty interest.<sup>167</sup> In order to successfully claim that one is deprived of a liberty interest, the claimant must show not only that his reputation was harmed but also that his legal status has been altered as well.<sup>168</sup>

Mr. Brown is a sex offender and based upon general sex offender registration and notification laws, Mr. Brown will always be known as

<sup>161</sup> Brief of Petitioner-Appellant at 5, *Brown v. Michigan City*, No. 05-3912 (7th Cir. Sept. 5th, 2006).

<sup>162</sup> Compare *Brown*, 462 F.3d at 722, with *Lafayette II*, 377 F.3d at 771.

<sup>163</sup> See *Brown*, 462 F.3d 720; *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 254-56 (1974); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

<sup>164</sup> *Brown*, 462 F.3d at 732-34.

<sup>165</sup> *Id.* at 729-30.

<sup>166</sup> *Id.* at 730.

<sup>167</sup> *Paul v. Davis*, 424 U.S. 693, 708-09 (1976).

<sup>168</sup> *Id.*



a sex offender.<sup>169</sup> According to the law of Indiana, he has a reporting duty for life.<sup>170</sup> His name, address, photograph, physical description, and crime are readily available for anyone to view.<sup>171</sup> The legislation in this case is different.<sup>172</sup> This is special legislation directed at Mr. Brown in his individual capacity.<sup>173</sup> The Park Board had given him a different status than other sex offenders.<sup>174</sup> Not only must he comply with all other city, county, state, and federal laws, but Mr. Brown must also comply with a park ordinance which bans him from all city parks.<sup>175</sup> This is an alteration of his legal status.<sup>176</sup> He has lost a right that every other citizen and every other sex offender in Michigan City still holds.<sup>177</sup> Additionally beyond this altered status, Mr. Brown is also known as a “present threat.”<sup>178</sup>

The facts in this case may satisfy the requirements of *Paul v. Davis*<sup>179</sup>; however, the Seventh Circuit was quick to come to the decision that Mr. Brown did not have an altered status and that he was not denied a right.<sup>180</sup> This is another example of how leniently sex

<sup>169</sup> See IND. CODE 11-8-8-7 (2006); see also Offender Detail for Robert Eugene Brown, Indiana Sheriffs’ Sex Offender Registry, <http://www.insor.org/insasoweb/details.do?sid=339457.011> (last visited December 5, 2006).

<sup>170</sup> See IND. CODE 11-8-8-7.

<sup>171</sup> *Id.*

<sup>172</sup> Reporting and residency restrictions apply to all sex offenders, whereas this ordinance applies solely to Mr. Brown.

<sup>173</sup> See *Brown*, 462 F.3d at 726. Special legislation is legislation directed at a particular person or class, as opposed to the general public. BARRON’S LAW DICTIONARY (2003). Special legislation is valid as long as it comports with the Constitution, specifically the 14th Amendment. *Id.* Special legislation must pass rational basis review. *Id.*

<sup>174</sup> See *Brown*, 462 F.3d at 725.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 729.

<sup>179</sup> See 424 U.S. 693, 708-09 (1976).

<sup>180</sup> *Brown*, 462 F.3d at 730.

offender legislation is reviewed, allowing rights of a whole class of people, and in some cases an individual, to be stripped away.

*C. Brown v. Michigan City: Rational Basis Review*

In *Brown v. Michigan City* the court, having found no constitutional violation, reviewed the park ordinance under the rational basis standard of review.<sup>181</sup> According to this standard, the government interest must be legitimate and the means employed to meet that end must be rational.<sup>182</sup> Under this deferential standard it is easy to see why sex offender laws pass constitutional muster.<sup>183</sup> The Michigan City Park Board has a legitimate reason for keeping Mr. Brown out of the parks.<sup>184</sup> He is a convicted sex offender, specifically a child molester, who frequently visits a park where children are present.<sup>185</sup> The legitimate reason is the interest in protecting children from a sex offender.<sup>186</sup> The means to that end is also rational; the City is preventing one known child molester from entering a park where children are present.<sup>187</sup>

However, it would not be as easy for sex offender legislation to be found constitutional if the courts applied a higher standard of scrutiny, such as strict scrutiny.<sup>188</sup> For strict scrutiny there needs to be a compelling governmental interest and means narrowly tailored to serve that interest.<sup>189</sup> Any municipality can argue that the protection of children and other victims is a compelling interest, but a court must

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<sup>181</sup> *Id.* at 733.

<sup>182</sup> *Id.*

<sup>183</sup> *See id.* at 733-34 (noting that children are vulnerable members of society which the City must shield from sexual abuse).

<sup>184</sup> *Id.* at 734.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *See Johnson v. California*, 543 U.S. 499, 505 (2005).

<sup>189</sup> *Id.*

determine whether that interest is served by the law and whether that law is narrowly tailored.<sup>190</sup>

Strict scrutiny should be applied to the park ordinance. It should be applied because the ordinance deals with a fundamental property right to access a public park and a fundamental liberty interest in one's reputation.<sup>191</sup> Alternatively, it should also be applied because this ordinance is based upon a suspect classification: a prior sex offense.<sup>192</sup> Sex offenders, based on registration and notification, are an easily identifiable group with little political power.<sup>193</sup> On the other hand those that legislate against sex offenders have the power of the public behind them.<sup>194</sup> A heightened protection is necessary to ensure the validity of laws against sex offenders.<sup>195</sup> Accordingly, because of the implication of fundamental rights and the classification of sex offender, strict scrutiny is necessary to judge the park ordinance.<sup>196</sup> In *Brown* the ordinance is narrowly tailored because the Park Board modified its ordinance after the commencement of the litigation to only affect Mr. Brown.<sup>197</sup> It is less clear whether this ordinance actually serves its purpose.<sup>198</sup> Thus, this ordinance may not pass strict scrutiny review because although it is narrowly tailored, and although there is a compelling interest, there is no obvious nexus or evidence as to whether the children in the Michigan City parks are safer because one convicted sex offender is no longer permitted to enter the parks.

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<sup>190</sup> *Id.*

<sup>191</sup> See 16B AM. JUR. 2D *Constitutional Law* § 815 (2006).

<sup>192</sup> See *id.*

<sup>193</sup> Bret R. Hobson, *Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away From Children?*, 40 GA. L. REV. 961, 987 (2006) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803)).

<sup>194</sup> See *id.* at 987-88.

<sup>195</sup> *Id.*

<sup>196</sup> See 16B AM. JUR. 2D *Constitutional Law* § 815.

<sup>197</sup> *Brown v. Michigan City*, 462 F.3d 720, 726 (7th Cir. 2006).

<sup>198</sup> See *id.* If the purpose to protect children, the banning of one particular sex offender as opposed to all sex offender seems to not serve the purpose. See also Whitnell, *supra* note 5.

*D. What rights should sex offenders be entitled to?*

Sex offenders rest in a gray area of civil rights. Registration and required public access make sex offenders an easily identifiable group.<sup>199</sup> Distance marker legislation and child safety zone legislation are quickly limiting where convicted sex offenders may live, work, and even loiter.<sup>200</sup> Sexually violent predator acts commit sex offenders even after their sentence has been served.<sup>201</sup> All of these laws place restrictions upon sex offenders after they have served their sentence, and place heavy restrictions upon sex offenders as they re-enter society.<sup>202</sup> Upon re-entrance, they have neither the rights of an imprisoned individual nor the rights of an ordinary citizen.<sup>203</sup>

*Brown v. Michigan City* represents, yet another law which restricts the liberty of a sex offender and strips away a sex offender's rights.<sup>204</sup> The Seventh Circuit responded to the question of whether sex offenders have rights in the negative.<sup>205</sup> This decision allows a piece of special legislation by a municipality to ban one individual from entering the public parks.<sup>206</sup> It stands for the proposition that a sex offender does not have the right of access or enjoyment to a public space because of his past crime.<sup>207</sup> This may lead to a slippery slope.<sup>208</sup> Here, Mr. Brown is not allowed in the park because he is a threat to children, but what is there to stop possible future legislation which may ban a sex offender from a library, museum, etc., because children may be present.<sup>209</sup> *Brown* also stands for the proposition that a

<sup>199</sup> See NIETO, *supra* note 66 at 8-9.

<sup>200</sup> See *id.* at 3; see also Doe v. Miller, 405 F.3d 700 (8th Cir. 2005).

<sup>201</sup> See NIETO, *supra* note 66 at 3; see also Kansas v. Hendricks, 521 U.S. 346.

<sup>202</sup> See Whitnell, *supra* note 5.

<sup>203</sup> See Hobson, *supra* note 193 at 988.

<sup>204</sup> Brown v. Michigan City, 462 F.3d 720 (7th Cir. 2006).

<sup>205</sup> *Id.* at 734.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> See *id.*

<sup>209</sup> *Id.*

sex offender's liberty interest is not implicated when a legislating body creates a tailored piece of legislation which not only names and identifies a particular person, but calls him a "present threat."<sup>210</sup>

Sex offenders are a class of individuals who are an easy target for legislation.<sup>211</sup> However, the judiciary cannot in good faith strictly uphold each and every act, law, or ordinance directed against sex offenders.<sup>212</sup> Although the majority of the population may approve of sex offender laws and although at the core of the law there may be a rational basis, the judiciary still has a constitutional duty to protect citizens from the "tyranny of the majority."<sup>213</sup> It can be argued that:

Justices betray their duty of judicial review when they turn substantive due process analysis into a mere academic exercise, placing a few defined pigeonholes of fundamental rights on one side that receive strict scrutiny protection from legislative threats and relegating everything else to a second side that triggers only highly deferential review. If courts blindly apply rational basis review whenever the threatened right is deemed less than fundamental, even the most severe, unfair restraint may survive.<sup>214</sup>

In the realm of sex offender laws, whether the claim is based on fundamental rights or other punitive challenges, the courts have continually found no violation and the ordinance always passes the deferential review granted.<sup>215</sup> But, a heightened standard is necessary to justify certain regulations against sex offenders because sex offenders resemble a discrete and insular minority with no political

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<sup>210</sup> *Id.*

<sup>211</sup> Whitnell, *supra* note 5.

<sup>212</sup> See Hobson, *supra* note 193 at 988.

<sup>213</sup> *Id.* at 989.

<sup>214</sup> *Id.* at 988.

<sup>215</sup> See, e.g., *Seling v. Young*, 531 U.S. 250 (2001); *Doe v. City of Lafayette*, 377 F.3d 757, 770- 71 (7th Cir. 2004).

power and because sex offender laws substantially restrict where a sex offender may live, work, and loiter.<sup>216</sup>

### CONCLUSION

Focusing solely on the general trend, the Seventh Circuit conformed to precedent. Neither the Supreme Court nor the Seventh Circuit has struck down a piece of sex offender legislation based on a constitutional challenge. However, this is not good policy. Although sex offenders may be a serious threat to society, the judiciary cannot base their decisions solely on the status of the individual. Sex offender legislation punishes those who have already fulfilled their sentence. It is upon their re-entrance to society that legislation restricts their freedoms. To restrict them solely based on their status punishes them twice for the same crime.

Specifically, in the case of *Brown v. Michigan City*, the Seventh Circuit had the opportunity to decide about the rights of Mr. Brown without looking at the outcome. There is no Supreme Court precedent as to whether child safety zone legislation is constitutional or whether banning an individual from a park is constitutional and the facts of the case are distinguishable from that of the *Doe v. Lafayette*. Further, in regards to Mr. Brown's liberty interest in his reputation, this ordinance was specifically tailored to him and identified him as a present threat to children. It resulted in a change of status that could satisfy the test propounded in *Paul v. Davis*. And finally, the court glossed over this analysis and found this ordinance to pass rational basis review.

According to this precedent, as established by the Seventh Circuit, sex offenders do not have the rights of a citizen. Sex offenders only have rights which are left to them after legislation is done with them. Currently, they do not have the right to remain anonymous, the right to live where they choose, the right to loiter where they choose, and possibly the right to enter a public park. As legislation against sex offenders continues its growth it is unclear what rights sex offenders will be left with.

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<sup>216</sup> See Hobson, *supra* note 193, at 987.

In order to protect this “unpopular” group, the judiciary must not follow the tyranny of the majority. The Seventh Circuit and other courts must make reasoned decisions based on the law, not the outcome and apply a stricter standard of review when the fundamental rights of an unpopular group are slowly being stripped away.